

1 I. NEEL CHATTERJEE (STATE BAR NO. 173985)
nchatterjee@orrick.com
2 THERESA A. SUTTON (STATE BAR NO. 211857)
tsutton@orrick.com
3 MORVARID METANAT (STATE BAR NO. 268228)
mmetanat@orrick.com
4 ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
5 Menlo Park, CA 94025
Telephone: 650-614-7400
6 Facsimile: 650-614-7401

7 Attorneys for Plaintiff
FACEBOOK, INC.
8

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION
12

13 FACEBOOK, INC.,

14 Plaintiff,

15 v.

16 POWER VENTURES, INC. a Cayman Island
Corporation; STEVE VACHANI, an
17 individual; DOE 1, d/b/a POWER.COM,
DOES 2-25, inclusive,

18 Defendants.
19

Case No. 5:08-cv-05780 JW (HRL)

**PLAINTIFF FACEBOOK INC.'S
MOTION TO ENLARGE TIME
PURSUANT TO CIVIL LOCAL
RULE 6-3 AND 16-12**

Judge: Hon. James Ware
Courtroom: 8, 4th Floor

1 **I. INTRODUCTION**

2 Plaintiff Facebook, Inc. seeks an order pursuant to Civil Local Rules 6-3 and 16-12
 3 modifying the Case Management Order and continuing the hearing date on Power's Motion for
 4 Summary Judgment. Though the parties have engaged in limited discovery to-date, Power is
 5 actively interfering with Facebook's ability to obtain any meaningful discovery. Power refuses to
 6 cooperate with Facebook in resolving outstanding issues – issues Facebook identified in May –
 7 and is preventing Facebook from taking depositions in this case. Facebook has sought to resolve
 8 these issues through detailed meet-and-confer letters, electronic mail and an in-person meeting.
 9 Power delays responding to any form of communication from Facebook or fails to respond at all,
 10 in some cases. In addition, although Power's counsel appeared at an in-person meeting with
 11 Facebook counsel, he did so without any authority to resolve the discovery disputes. It then took
 12 him nine days to provide a response to Facebook's in-person proposals – at which time Power
 13 rejected each of them.

14 Power's dilatory tactics are preventing Facebook from meeting the currently set Case
 15 Management deadlines. Specifically, expert reports are due on July 29; Power's refusal, to
 16 produce relevant material (including its source code), is preventing Facebook's experts from
 17 beginning their work. Further, Power filed a Motion for Summary Judgment seeking dismissal of
 18 all of Facebook's claims, but is refusing to respond to interrogatories, provide witnesses for
 19 deposition or produce relevant documentation. As a result of Power's refusal to comply with its
 20 discovery obligations, Facebook is now forced to seek modification of the Case Management
 21 Schedule and the hearing date for Power's pending motion.

22 **II. STATEMENT OF RELEVANT FACTS**

23 This case is about Power's knowing and unauthorized access to Facebook's protected
 24 computer network, impermissible storage and use of Facebook users' login data, and
 25 unauthorized use of Facebook user accounts to send unsolicited commercial messages.

26 **A. Power's Refusal To Properly Respond To Written Discovery**

27 On October 22, 2010, Facebook served Power with its First Set of Requests for
 28 Production of Documents and First Set of Interrogatories. Declaration of I. Neel Chatterjee

(“Chatterjee Decl.”), ¶ 2. Nearly two months later, Power responded to Facebook’s discovery requests with boilerplate objections and partial responses. *Id.* Specifically, in response to Facebook’s document requests, Power agreed only to “conduct a reasonable search” for materials, but did not agree to actually produce anything. *Id.*, Ex. A. Nearly two months after serving its objections, Power produced **13** documents in response to the **50** document requests propounded by Facebook. *Id.*, ¶ 2. Power refused to produce a copy of its source code as requested by Facebook.

In addition, Power purported to respond to Facebook’s interrogatories pursuant to Fed.R.Civ.P. 33(d), but has yet to identify which documents it produced are in response to which interrogatory, as required by the Rule. *See id.*, Ex. B. Also, Power’s meager production does not appear to correspond with its interrogatory responses and suggests that Power has not fully complied with its obligations pursuant to Rule 33(d).

On June 2 and 3, 2011, Facebook served defendants Vachani and Power with its first and second sets of document requests, respectively. *Id.*, ¶ 3. Less than a week before they were due, defendants sought an extension of time to respond. When they did respond, on July 5, 2011, they responded as Power had before: with a promise only to “conduct a reasonable search” for responsive materials. *Id.*, Exs. C & D.

B. Power’s Refusal To Provide A Witness For Deposition

This pattern of delay also infected Facebook’s efforts to schedule depositions. On June 1, 2011, Facebook noticed Power’s deposition for June 15, pursuant to Fed.R.Civ.P. 30(b)(6). *Id.*, ¶ 4. On June 6, 2011, Facebook noticed the deposition of Steve Vachani for July 11, 2011.¹ *Id.* On June 13, two days before Power’s scheduled deposition, Power’s counsel unilaterally

¹ Facebook also noticed the depositions of Eric Santos and Felipe Herrera. At the parties’ in-person conference, Mr. Fisher indicated that Mr. Santos or Mr. Herrera reside in Brazil and are no longer Power employees. *Id.*, ¶ 6. Mr. Fisher indicated that he would request contact information from his client and provide it to Facebook. *Id.* On July 1, 2011, Mr. Fisher wrote: “we are working on obtaining contact information for them and will let you know when we have additional information we can share.” *Id.* As of this filing, Mr. Fisher has not provided contact information for Messrs. Santos and Herrera. Facebook must serve a subpoena to compel these individuals attendance at a deposition. Because they are Brazilian residents, Facebook’s ability to take their testimony will be governed by applicable local rules and laws, requiring the issuance of Letters Rogatory. *Id.* This will further delay Facebook’s ability to obtain relevant discovery.

1 cancelled the deposition. *Id.* In response, Facebook requested Power's and Mr. Vachani's
 2 availability for depositions. Power waited a week to propose deposition dates, at which time
 3 Power provided a single half-day for both Power and Mr. Vachani. *Id.* Facebook requested
 4 additional dates, as it was unavailable on that day. Power provided four additional half days that
 5 conflict with pre-existing commitments for Facebook's counsel. *Id.* When Facebook sought
 6 additional dates from Power, Power offered the same half days, along with one additional full day
 7 and another half day during the week of July 12. Facebook sought clarification from Power's
 8 counsel as to whether the witnesses would be made available pursuant to Rule 30(d)(1) and would
 9 agree to produce documents (in response to document requests) prior to the depositions. Instead
 10 of agreeing to comply with the Federal Rules, however, defendants' counsel responded that he
 11 had to confer with his client. As of this filing, Facebook still has not received a response.

12 **C. Facebook's Efforts To Resolve The Disputes**

13 On May 12 and 17, 2011, Facebook sent a letter to Power's counsel, Timothy Fisher,
 14 detailing the deficiencies in Power's responses to Facebook's first set of document requests and
 15 interrogatories, respectively.² *See id.*, Exs. E & F. Although Facebook requested a response from
 16 Power within a week, Mr. Fisher waited nearly three weeks to respond (despite promises to
 17 respond sooner). *Id.*, ¶ 5. Facebook again wrote to Mr. Fisher seeking full and complete
 18 responses to its discovery requests. *Id.*, Exs. G & H. Power ignored Facebook's requests for
 19 resolution.

20 Following Power's refusal to engage in any meaningful discussions to resolve the parties'
 21 discovery disputes – including setting depositions – Facebook requested an in-person meeting in
 22 compliance with Judge Lloyd's Standing Order Re Civil Discovery Disputes. Counsel met on
 23 June 22, 2011. *Id.*, ¶ 7. Mr. Fisher indicated he was lead counsel for Power, but at the meeting

24
 25 ² Power is likely to argue that Facebook delayed raising any discovery disputes. In fact,
 26 Facebook's investigation showed that the power.com website is for sale and, thus, not
 27 operational. Facebook believed, therefore, that Power is no longer in business. Facebook
 28 reached out to Power's counsel to discuss settlement. Despite Power's promises to provide a
 response to the settlement offer, Power ignored Facebook's efforts. In the meantime, however,
 Facebook saw no benefit to expending resources on this case when it appeared Power was not in
 business and settlement was possible. Power then filed its Motion for Summary Judgment,
 indicating it is not interested in settling this case.

1 appeared to have no authority whatsoever to resolve any of the disputes. Instead, he said he must
 2 confer with his client. *Id.* After the meeting, Facebook asked Power to respond to Facebook's
 3 proposals for resolving the discovery disputes by June 28. At 7:00 P.M. on June 28, Mr. Fisher
 4 sent an email to say he had been engaged on other matters and had not yet conferred with his
 5 client. He then wrote that he would "try" to respond to Facebook's proposals by July 1. *Id.*
 6 Facebook asked for confirmation that Power would provide, on July 1, substantive responses to
 7 Facebook's proposals. Power ultimately responded at the close of business on July 1, but rejected
 8 each of Facebook's proposals.

9 On June 29, 2011, Facebook requested that Power stipulate to a modification to the Case
 10 Management Order. On July 1, 2011, Power wrote that it was unwilling to extend the pre-trial
 11 deadlines. *Id.*, ¶ 8.

12 **III. ARGUMENT**

13 **A. Good Cause Exists To Modify the Scheduling Order.**

14 Pursuant to Federal Rule of Civil Procedure 16(b)(4), and the Local Rules 6-3 and 16-2, a
 15 scheduling order may be modified upon a showing of good cause. Rule 16(b)'s "good cause"
 16 standard permits modification of a pretrial schedule if the pretrial schedule "cannot reasonably be
 17 met despite the diligence of the party seeking the extension." Fed. R. Civ. P. 16 advisory
 18 committee's notes (1983 amendment); *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th
 19 Cir. Cal. 1992).

20 Good cause exists to extend the current case management schedule. Expert reports
 21 currently are due on July 29, and discovery is set to end on September 30. Because Power is
 22 refusing to cooperate in discovery, however, Facebook will be unable to meet the current
 23 deadlines. For instance, Power has refused to produce key documents, including its source code,
 24 and thereby preventing Facebook's experts from analyzing relevant code and materials prior to
 25 finalizing their reports. Moreover, Power's refusal to produce a single witness for deposition –
 26 the one witness with any knowledge of the facts supporting Facebook's claims and Power's
 27 defenses – is preventing Facebook from preparing its case and its own dispositive motions.
 28 Indeed, Power and Mr. Vachani are uniquely in possession of information regarding the process

1 by which Power accessed or allowed others to access the Facebook website and services –
 2 information directly relevant to Facebook’s allegations under the CFAA, CAN-SPAM Act, and
 3 California Penal Code 502. Without this information, Facebook will be unable to provide this
 4 Court with the information necessary for this Court to make informed decisions.

5 Facebook has repeatedly sought Power’s cooperation in resolving the outstanding
 6 discovery issues, but it refuses to do so. Power should not be permitted to prevent Facebook from
 7 meeting the case management schedule by delaying and refusing to cooperate. For these reasons,
 8 Facebook respectfully requests an order modifying the Case Management schedule by 60 days.

9 **B. Good Cause Exists To Enlarge Time To Respond To Power’s Motion For**
 10 **Summary Judgment.**

11 Facebook also seeks an Order continuing the hearing on Power’s Motion for Summary
 12 Judgment (and all related deadlines) until at least October 24, 2011. Rule 6(b) authorizes the
 13 enlargement of time for “cause shown.” Good cause exists.

14 Defendants filed their Motion for Summary Judgment on May 9, 2011. Defendants move
 15 for summary judgment on all three of Facebook’s claims. In their motion, Defendants argue that
 16 Power did not initiate the transmission of email messages that are in violation of the CAN-SPAM
 17 Act. *See* Dkt. No. 98 at 12-13. Defendants also argue that Facebook’s claims pursuant to the
 18 CFAA and California Penal Code 502 fail because Power “did not circumvent any technical
 19 barriers.” *Id.* at 16-19. Much of the discovery in dispute relates to the process by which Power
 20 accessed or allowed its users to access the Facebook website and services (such as sending email
 21 to users). Power’s failure to provide Facebook with the discovery it seeks, especially its refusal
 22 to produce Power’s source code, or to engage in any meaningful discussions to resolve the issues,
 23 prevents Facebook from adequately investigating its claims and arguments in opposition to
 24 Defendants’ Motion for Summary Judgment.

25 ///

26 ///

27 ///

28 ///

1 **IV. CONCLUSION**

2 For the reasons stated above, Facebook respectfully requests an order modifying the
3 August 19, 2011 Scheduling Order by 60 days and enlarging the time for the hearing on
4 defendants' Motion for Summary Judgment and related briefing deadlines.

5
6 Dated: July 6, 2011

ORRICK, HERRINGTON & SUTCLIFFE LLP

7 /s/ Theresa A. Sutton

8 Theresa A. Sutton
9 Attorneys for Plaintiff
10 FACEBOOK, INC.
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28